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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 300

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant,

vs.

S. B. HANNA,
Appellee.

STATEMENT IN SUPPORT OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Preliminary Statement.

With the object of a better understanding of this case, the appellant believes the recitation of a bit of historical matter in explanation of the record, although to some extent antedating it, may be helpful.

Several years ago, the appellant, in the conduct of its telephone utility business in Arkansas, commenced a campaign to enforce its Rule V-c, as it is generally known in the record. This rule reads:

> "USE OF CUSTOMER SERVICE—Customer telephone service, as distinguished from public and semi-public telephone service, is furnished only for use by the customer, his family, employees or business associates, or

persons residing in the customer's household, except as the use of the service may be extended to joint users. The Telephone Company has the right to refuse to install customer service or to permit such a service to remain on premises of a public or semi-public character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, customer service may be installed, provided the instrument is so located that it is not accessible for public use" (R. 61).

As a result of this campaign of enforcement, the City of Fort Smith enacted an ordinance which had the effect of setting aside the rule. This ordinance was validly enacted under the Arkansas Utilities Act establishing a dual form of utility regulation—a delegation of authority to regulate utilities, both to the cities, and to the State Commission, there called the Department of Public Utilities, with revisory control over city ordinances by the Department on what is commonly known as appeal.

The ordinance of the City of Fort Smith was appealed to the Department by the appellant here, and the Department found, after a considerable hearing, that the ordinance was unreasonable, and that the appellant's rule was reasonable, and the Department ordered the vigorous enforcement of the rule throughout the State. (Its opinion and order are in the record here.) The validity of this order was affirmed, on appeal, by the Supreme Court of Arkansas. (*City of Fort Smith* v. *Department of Public Utilities*, 195 Ark. 513, 113 S. W. 2d 100.) In order to avoid the penalties of the Utilities Act, appellant had no alternative save to enforce the rule, whereupon appellant was held liable for statutory penalties, under Section 14261, *infra*, on account of said enforcement.

The rule, by its clear terms, restricts the use of customer service, under customer rates, to the customer, his family,

his employees, and his business associates. If service is wanted for others as well, the classification of service is no longer the customer classification, but is the semi-public classification, to which different rates apply as indicated in the appellant's filed tariffs which are in the record here.

This case originated in a written demand by the plaintiff below that, in substance, the appellant provide him with service of the semi-public classification, (to which the rule would not apply), at the rate for service of the customer classification, (to which the rule would apply). The appellant refused to comply with this written demand because to do so would be to violate the Arkansas Utilities Act requiring that the filed rates must not be departed from (Pope's Digest, Sec. 2075.)

Thereupon the plaintiff below instituted this action for the recovery of penalties provided by the laws of Arkansas (Pope's Digest, Sec. 14261), reading:

> "Discrimination—Penalty. Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that is not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under a penalty of one hundred dollars, and five dollars per day for each day from the expiration of said notice until said demand is complied with or suit is instituted for penalty for failure to comply with said demand, for such discrimination, after compliance or offer to comply with the reasonable regulations of such

> company and the time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. And any person denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same and the court shall hear such applications either in vacation or in term time and make such temporary orders relative to the furnishing of such facilities as the facts may justify, and may enforce compliance therewith, until such orders are vacated by order of the Court or the judge at chambers, or such suit is finally determined."

The plaintiff's claim at the trial of the cause was, not that the rule was unreasonable, but that other customers were violating the appellant's rule, or were receiving service of the semi-public classification at the lower rate for the customer classification, and that the refusal of the appellant to violate the Utilities Act in his case, by providing semi-public service at the customer rate, subjected the appellant to the penalties of Section 14261.

The Supreme Court of Arkansas affirmed plaintiff's judgment by declaring the rule unreasonable in a collateral proceeding, although the same rule had been earlier declared reasonable by the regulatory tribunal.

Statutory Provision Sustaining Jurisdiction of the Supreme Court of the United States.

This Court has jurisdiction of this cause under Judicial Code, Section 237 as amended (28 U. S. C. A. 344), which provides:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion award execution or remand the cause to the court from which it was removed by the writ.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph. (R. S. Sections 690, 709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Sections 1, 43 Stat. 937.)

28 U. S. C. A. Sections 344 (a) and 344 (b) and under 28 U. S. C. A., Sections 861 (a) and 861 (b):

"(a) The writ of error in cases, civil or criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal (Jan. 31, 1928, c. 14, Sec. 1, 45 Stat. 54).

(b) The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which section 861 (a) of this title substitutes for a writ of error. (Jan. 31, 1928, c. 14, Sec. 2, 45 Stat. 54, as amended April 26, 1928, c. 440, 45 Stat. 466.)"

Statute of Arkansas, Validity of Which is Involved.

The validity of the Statute of Arkansas (Pope's Digest, sec. 14261, as interpreted in the decision of the Arkansas court in this cause, see *Ward v. Krinsky*, (1922) 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 1033) is here involved. The statute has heretofore been quoted herein, verbatim.

There is furthermore involved herein the action of the Supreme Court of Arkansas in adjudging the appellant's aforesaid rule to be unreasonable, when it did so in a collateral action—without any statutory delegation of authority to perform this legislative function—and did so without any evidence to support its finding that the rule was unreasonable.

The only statute of Arkansas that could conceivably authorize the court so to act legislatively is the selfsame penalty statute, sec. 14261, and if it could be so construed, the validity of that statute is again challenged for its constitutional imperfections.

The appearances are that the Supreme Court of Arkansas acted legislatively in this case, in complete disregard of the statutes, and without any statutory authority to act

legislatively, whereas if it had had statutory authority to act as it did in this case, the validity of the statute under which it might have so acted would have also been here challenged and involved.

Date of Judgment and Application for Appeal.

The judgment sought to be reviewed was entered in the lower court on May 8, 1939, by the Supreme Court of Arkansas, the highest court of the State, on April 8, 1940, and appellant's petition for rehearing in the Supreme Court of Arkansas was denied June 3, 1940. Application for appeal to the Supreme Court of the United States was presented and granted June 27, 1940.

Stage at Which the Federal Questions Were Raised.

The Federal questions (all involved the Federal constitution) were first raised on petition for rehearing, in the Supreme Court of Arkansas, except as the appellant in its briefs before said court undertook to demonstrate the unconstitutional consequences of such a decision as the court reached. These considerations were offered, however, not so much to raise questions of constitutionality, as to influence an interpretation of the penalty statute which would permit it to conform with the constitution. The appellant, under statutory injunction, particularly in view of the order of the regulatory body, was obliged to enforce its rule, and it could not have anticipated a decision that its rule would be declared unreasonable, and that it could be declared so in a collateral proceeding for the first time by an appellate court, without evidence, and without notice and hearing, and without any issue being tendered in the trial court. The constitutional questions were raised in the petition for rehearing, in substantially the same language as contained in the accompanying assignment of errors. Appellant had no earlier opportunity to raise the Federal questions.

The Supreme Court of Arkansas disposed of the Federal questions so raised in the petition for rehearing by denying the petition without comment by *per curiam* opinion dated June 3, 1940.

The Federal Questions Are Substantial.

All of the Federal questions here raised have to do with the invasions of the appellant's rights vouchsafed by the 14th Amendment to the Constitution of the United States; and as such all these questions are substantial.

The Substantial Federal Questions Involved.

1. The court so construed the penalty statute under the circumstances of this case, as to deprive appellant of its property.

At no time in the trial of the case in the circuit court, nor in the briefs presenting the case to the Supreme Court of Arkansas, was the reasonableness of the appellant's rule V-c questioned, even if we indulge the rash assumption that it could be questioned in a collateral proceeding. Not until the decision of the Supreme Court of Arkansas did appellant apprehend that there was, or could be, any contention that the rule was unreasonable, or that by any chance such an interpretation could be put upon it in this case.

Under these circumstances, the assessment of penalties, although the appellant in good faith sought to enforce said rule in obedience to the order of the Department of Public Utilities, amounts to a construction of the penalty statute, Section 14261, so as to take appellant's property without due process of law and deny to it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States. In an analogous case, almost a dead parallel, where the predecessor of this appellant was enforcing a rule which it had every reason to believe was

reasonable, this Court reversed the judgment of the Supreme Court of Arkansas, which had held the rule unreasonable and had allowed penalties against appellant, for the reason that the penalty statute, Section 14261, was so construed as to deprive appellant of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U. S. 482, 35 S. Ct. 886, 59 L. Ed. 1419.

2. The court in its pretended exercise of legislative authority acted so as to deny due process to appellant.

The action of the Arkansas court in declaring the appellant's rule unreasonable deprived the appellant, in a strange way, of due process of law in the fixing of a rate for utility service.

The regulation of the rates of public utilities is a legislative process. The upsetting of the appellant's rule defining the amount of service to be provided for the established rate necessarily constitutes a rate order. Every rule affecting a rate is a part of the rate—and so specifically says the statute of Arkansas in its definition of "rate" (Sec. 2064, Pope's Digest).

The legislative regulatory power in this day is customarily delegated to administrative commissions with provision for judicial review of the lawfulness of their orders by direct proceedings in the courts. This is the procedure established by the Arkansas Utilities Act (Act 324, Laws of 1935). The legislative power is delegated to the Department of Public Utilities, and the courts are invested with jurisdiction in a direct proceeding to determine whether the Department "has regularly pursued its authority". The statute (clearly enough, it would seem) does not delegate any legislative authority to the courts, but confines their jurisdiction to a simple yea or nay answer to the question

of the Department's order having been reached in accordance with its statutory authority.

The jurisdiction of the Department legislatively to determine the reasonableness of the appellant's rule was involved some two years before the case at bar was brought, and, after hearing, the Department confirmed its reasonableness and ordered the rule enforced. Upon appeal, eventually reaching the Supreme Court of Arkansas, that court sustained the order of the Department as validly made in its legislative capacity (*Fort Smith* case, *supra*). The court in that case was, however, not concerned with the reasonableness of the rule since it had not been claimed that the department exceeded its statutory authority to prescribe only reasonable rules.

Under the circumstances, in the case at bar, the action of the Supreme Court of Arkansas in adjudging the appellant's rule to be unreasonable effects a deprivation of appellant's property without due process of law contrary to the 14th Amendment in two ways:

(a) The court essays a legislative act, without any delegated authority so to act, and employs its judicial power of execution of its judgments to enforce its spurious legislative order. This procedure so offends the traditionally accepted concepts of the orderly processes of law as to constitute a taking without due process. Due process of law, in its simplest meaning, cannot embrace the unexpected promulgation of a legislative order by a judicial tribunal without delegated legislative authority, followed by the judicial execution of the legislative order against the property of the appellant.

(b) If it be assumed that the Supreme Court of Arkansas, by some non-existent statute, possesses legislative power to regulate utility rates, then the exercise of that power by the court in this case denies the appellant due process of law.

The appellant was afforded no notice of attack, even the forbidden collateral attack (*Texas, etc., R. Co.* v. *Abilene Cotton Oil Co.*, 240 U. S. 426, 51 L. Ed. 553), on the reasonableness of its rule, nor any hearing thereon. The Arkansas court in its own opinion (140 S. W. 2d 132, 134) conceded that the issue of reasonableness had not been tendered at the trial. And consequently, of course, no evidence of the reasonableness of the rule was ever offered. The Supreme Court of Arkansas, accordingly, annulled the appellant's rule, which had been held reasonable and ordered enforced by the valid order of the regulatory Department, without evidence, without notice, and without hearing. This action amounts to a clear contravention of the 14th Amendment under the authority of:

Chicago, etc., R. Co. v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 970;

San Diego Land Co. v. *National City*, 174 U. S. 739, 43 L. Ed. 1154 (Ohio Case—Cardozo opinion);

West Ohio Gas Co. v. *Comm.*, 294 U. S. 63, 79 L. Ed. 761;

Ohio Bell Tele. Co. v. *Commission*, 301 U. S. 292, 81 L. Ed. 1093.

Without such opportunity for hearing, the appellant was unable to present its potential claims that the ultimate declaration of the unreasonableness of the rule would effect a taking of its property without due process of law by requiring the provision of free service to the non-customer classification:

Northern Pac. R. Co. v. *North Dakota*, 236 U. S. 585, 59 L. Ed. 735;

and by requiring the appellant to forsake its constitutional property right to establish itself reasonable classifications of service, and reasonable rates applicable thereto:

Chicago, etc., R. Co. v. *Wisconsin*, 238 U. S. 491, 59 L. Ed. 1423.

3. The court's decision effects a taking of appellant's property without due process in any event.

In the contingency that it might sometime be contended that this case might be construed as having been decided on a non-Federal ground, namely, on the ground of a discriminatory application of a reasonable rule, the appellant considers it essential to emphasize that such could not possibly be the case. Except as the rule is declared unreasonable, the case would be governed by the decision of the Arkansas court in *Southwestern Tel. & Tel. Co.* v. *Sharp & White*, 118 Ark. 541, 177 S. W. 25, which is nowhere overruled in the opinion here, but which is indeed cited in this very opinion with approval.

In addition, if the decision of the Arkansas court should be considered from the assumption that the rule was declared reasonable, rather than unreasonable, the decision holding appellant liable for penalties, when appellant was enforcing a tariff rule which it had been ordered to enforce by the Arkansas Department of Public Utilities, placed appellant in the anomalous and inequitable position where, if it complies with the order of the Department of Public Utilities, it becomes liable for the statutory penalty under Section 14261 of Pope's Digest, whereas, if it ignores the order of the Department of Public Utilities, in order to avoid penalties under Section 14261, it then becomes liable for penalties fixed by Sections 61 to 64 of the Public Utilities Act of Arkansas (Pope's Digest, Sections 2121 to 2124) for violation of the orders of said Department. Appellant is thus placed in a situation where it is liable for penalties whichever course it takes, with no way of escape. Under this decision, the compliance with one statute would produce the violation of another, with resulting penalties. Even if (contrary to the record), appellant had violated the Utilities Act in deliberately permitting some customers to re-

ceive service at less than tariff rates, appellant would not, in the opinion and decision herein, be permitted to mend its ways and to comply with said Act thenceforth, but would be forced to continue to violate the Act in order to avoid penalties under Section 14261, *supra*. Thus appellant would be denied the equal protection of the laws and its property would be taken without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, in being compelled to multiply its criminal offenses under the Utilities Act.

The effect of the opinion and decision is to penalize appellant for enforcing an order of the State regulatory commission at the first place that it encounters a violation, on the ground that enforcement of the order might have been started elsewhere. Appellant is under the duty and has the right to comply with the said order wherever it finds violations thereof, without liability for penalties under Section 14261, *supra*, and to force appellant to violate its duty and take away appellant's right deprives appellant of its property without due process of law and denies it the equal protection of the law.

The appellant is held liable for penalties in the face of the conceded fact that appellee was offered the service desired at the only lawful rate, i. e., the filed tariff rate, but refused such a service. The opinion and decision thus holds that appellee, in order to recover penalties, does not have to comply with the reasonable rules and regulations of appellant, in spite of the fact that Section 14261, the penalty statute, makes such requirement of appellee before penalties can be recovered. Reading out of and nullifying the provision requiring compliance or offer to comply with the reasonable rules and regulations of the telephone company, interprets and construes the penalty statute, sec. 14261, *supra*, so as to make it unreasonable, arbitrary and oppressive and causes

it to operate to deprive appellant of its property without due process of law and to deny it the equal protection of the law.

Penalties were assessed against appellant because the court found that other customers of appellant were violating their contracts with appellant and thereby violating the tariff rule which appellant sought to enforce against appellee. The rule, as are all tariff rules of appellant, is a part of appellant's contracts with its subscribers. There was no evidence that appellant knew of such violations by any customer until they so testified from the witness stand, but all the evidence pointed to the fact that appellant was vigorously and energetically enforcing the rule wherever violations came to its attention. In view of the fact that these violations occurring on the customer's premises were unknown to appellant, and since appellant was entitled to rely upon its customers to perform their contracts with appellant, for the court to hold appellant liable for penalties for discrimination for not permitting appellee to so violate the tariff rule is to interpret the penalty statute, section 14261, *supra*, so as to deprive appellant of its property without due process of law and deny it the equal protection of the law. Under this interpretation of the penalty statute it is impossible for appellant to avoid penalties by reason of the derelictions of its customers except by forsaking its right to establish reasonable classifications, reasonable rules and regulations, and reasonable rates. The imposition of either alternative deprives appellant of its property without due process of law.

Of necessity, under the foregoing circumstances, appellant raised the Federal questions in its petition for rehearing to the Supreme Court of the State of Arkansas, since no Federal questions appeared in the case until decision of that court. The Federal questions were disposed of by

the *per curiam* opinion of June 3, 1940, denying the petition for rehearing.

The opinion of the Supreme Court of Arkansas is appended to the jurisdictional statement in the case of *Southwestern Bell Telephone Co.* v. *Lee*, No. 299, October Term, 1940.

Respectfully submitted,

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